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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/582,119	06/22/2000	GERHARD BENNER	BEIERSDORF62	7901

7590

04/20/2004

NORRIS MCLAUGHLIN & MARCUS PA.
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NEW YORK, NY 10017

EXAMINER

WELLS, LAUREN Q

ART UNIT	PAPER NUMBER
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1617

DATE MAILED: 04/20/2004

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Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/582,119

Applicant(s)

BENNER ET AL.

Examiner

Lauren Q Wells

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 26 January 2004.
2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 15-22 is/are pending in the application.
4a) Of the above claim(s) _____ is/are withdrawn from consideration.
5) ☐ Claim(s) _____ is/are allowed.
6) ☒ Claim(s) 15-22 is/are rejected.
7) ☐ Claim(s) _____ is/are objected to.
8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☒ Other: See Continuation Sheet.

Continuation of Attachment(s) 6). Other: English Translation of FR 1,437,366.

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DETAILED ACTION

Claims 15-22 are pending.

103 Rejection Maintained

The rejection of claims 15-16, 18-20, 22 under 35 U.S.C. 103(a) as being unpatentable over Ansmann (4,735,742) in view of Pottier (FR 1,437,366) is MAINTAINED for the reasons set forth in the Office Action mailed 5/15/03, Paper No. 20, and those found below.

The rejection of claims 17 and 21 under 35 U.S.C. 103(a) as being unpatentable over Ansmann (4,735,742) in view of Pottier (FR 1,437,366), as applied to claims 15-16, 18-20, 22 above, and further in view of Wallat et al. (DE 3,820,693) is MAINTAINED for the reasons set forth in the Office Action mailed 5/15/03, Paper No. 20, and those found below.

Applicant argues, "Pottier lacks any teaching as to the presence or effect of palmitic-stearic acid mixtures or that the Pottier compositions have any effect on improving emulsifying power as in the Ansmann reference ". This argument is not persuasive. The Examiner respectfully directs Applicant to Col. 4, lines 23-line 39 of Ansmann, which teaches that oil-soluble oil in water emulsifiers may also be used in their invention up to 25% of the oil phase, such as the soaps of C12-C15 or C20-22 fatty acids, wherein glycerol stearate citrate, as taught by Pottier, is such a fatty acid. Thus, one of skill would be motivated to add the glycerol stearate citrate of Pottier to the composition of Ansmann because of the expectation of increased emulsification. Alternatively, Pottier teaches glycerol stearate citrate as a soap that suppresses the harmful influence of soap. Thus, one of skill in the art would be motivated to substitute the palmitic stearic acids of Ansmann for the glycerol stearate citrate of Pottier, because of the expectation of achieving similar emulsifying effects and of suppressing the harmful influence of

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fatty acid soaps (i.e., drying and cracking skin). The Examiner further respectfully points out that the test for obviousness is not whether the features of one reference may be bodily incorporated into the other to produce the claimed subject matter but simply what the combination of references makes obvious to one of ordinary skill in the pertinent art.

Applicant argues, "As Ansmann requires a specific ratio of palmitic acid-stearic acid, the examiner is also presuming that the applicants' invention also contains these components in addition to their own claimed components". This argument is not persuasive. It is respectfully pointed out that the instant claims contain the open-ended transitional term "comprising". Thus, the instant claims do not exclude any additional ingredients.

Applicant argues, "None of the cited references makes this recognition of the ratio between glycerol stearate citrate and cetylstearyl alcohol being a results effective variable". This argument is not persuasive. The Examiner respectfully directs Applicant to MPEP 2144.05, "Optimization of Ranges", "Generally, differences in concentration or temperature will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration or temperature is critical". It is respectfully pointed out that glycerol stearate citrate and cetylstearyl alcohol are art recognized emulsifiers. Thus, manipulating the amounts of these ingredients will achieve a recognized result, i.e. changes in the emulsification properties of a composition. Thus, these compounds are result effective variables.

Applicant argues, "The prior art references relied upon by the examiner never show the use of a composition comprising of a combination of glycerol/tocopheryl acetate, glycerol stearate citrate and cetylstearyl alcohol". This argument is not persuasive. It is respectfully

pointed out that the instant rejections are 103-obviousness types rejections, and not 102-anticipation type rejections. The combination of references teaches such a composition. Additionally, this argument is not commensurate in scope with the instant claims, which are not directed to a method of using the instant composition.

Applicant argues, “Even if in *arguendo* the prior art references rendered the composition obvious, the means by which the examiner achieves this holding requires the combination of compositions which contain a great number of additional components (e.g. combining example 7 of Ansmann with example 12 of Pottier)”. This argument is not persuasive. First, it is respectfully pointed out that the instant rejection adds glycerol stearate citrate to the composition of Ansmann and does not attempt to incorporate a composition exemplified by Pottier into a composition exemplified by Ansmann. Second, it is respectfully pointed out that Applicant’s open-ended transitional term, “comprising”, does not exclude additional ingredients.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

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Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

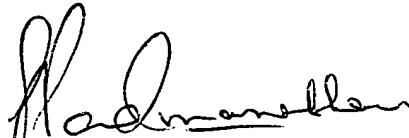
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lauren Q Wells whose telephone number is 571-272-0634. The examiner can normally be reached on M&R (5:30-4).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan can be reached on 571-272-0629. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

lqw



SREENI PADMANABHAN
SUPERVISORY PATENT EXAMINER